

of Cockburn, C.J., in *Churchyard v. The Queen*, (*supra*) contained in the passage from his judgment quoted above, must not be overlooked:—

“But in all these instances, where a contract is silent, the court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it was intentionally silent; and, above all, that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties.”

The difficulty of applying the *Hornsby* case to this contract arises from clause 5 which provides:—

“The Government reserves to itself the right to transport for its own or any use the materials herein mentioned by any other means.”

The plaintiff contends that “other means” should be construed as “means other than road transport,” e.g. water transport.

In my view such a construction is untenable. The clause is general. I cannot see any ground for limiting its application.

I am further of opinion that the generality of the clause excludes the application of the *Hornsby* case. The words “any other means” extend to the carts of other contractors. To hold otherwise would be to restrict the generality of the language. In my opinion, therefore, a covenant not to employ other contractors cannot be implied without doing violence to the language of clause 5.

It is well established that a term cannot be implied in a contract contrary to its express provisions. In *Cutter v. Powell*, 101 E.R. 573; 3 R.R. 185, Lord Kenyon, Ch. J., said:—

“That where the parties have come to an express contract none can be implied has prevailed so long as to be reduced to an axiom in the law.”

For these reasons I am unable to accept the plaintiff's contention that a covenant should be implied on behalf of the defendant that he will not do the work himself or employ other contractors.

My view of this contract is that there was no obligation on the part of the defendant to give orders to the plaintiff, that he was at liberty to do the work himself, and that, in view of clause 5, he was entitled to employ other contractors.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]

HOWES, J.

November 16, 1934.

LEE ENG HOCK, HO KOK LEONG, KHOO HOOI HAW

(On behalf of themselves and other shareholders) Plaintiffs.

v.

MALAY-SIAMESE PROSPECTING COMPANY, LIMITED Defendants.

[PERAK CIVIL SUIT No. 368 of 1934]

Company—Rejection of proxies—Instrument of Proxy—Attestation by appointee's substitute—Representative action by shareholders.

At the annual general meeting of the defendant company, the first and second plaintiffs were present and voted against a resolution, which was carried. The third plaintiff was not present, but was represented by a proxy, whose vote against the resolution was wrongly rejected. Had this vote been accepted the resolution would still have been passed.

Certain other proxies were rejected on the ground that the appointee's substitute had attested the signature of the appointor. At the meeting the appointee was present and consequently his substitute's provisional appointment never materialized.

Held, that the wrongful rejection of the third plaintiff's proxy gave rise to a grievance common to all the shareholders who had voted against the resolution entitling the plaintiffs to sue in a representative capacity on behalf of such shareholders.

Held further, that the proxies attested by the appointor's substitute were invalid and rightly rejected.

C. D. D. Hogan for the plaintiffs.

J. H. B. Will for the defendant company.

Cur. Ad. Vult.

HOWES, J.—In this case there are two Motions before the Court; one by the defendant company containing two prayers:—

- (1) That the claims of the plaintiffs Nos. 1 and 2 be dismissed and that the plaintiff in so far as it seeks to make such claims be struck out on the ground that it discloses no cause of action at the instance of the plaintiffs Nos. 1 and 2.
- (2) That the words “on behalf of themselves and all others the shareholders of the defendant company who voted against or were opposed to the resolutions passed at a general meeting of the defendant company held on the 31st July, 1934,” also be struck out of the plaint on the ground that the plaint discloses no matters giving ground for an action against the defendant company at the instance of the plaintiffs Nos. 1, 2 and 3 or any of them as representing all others the shareholders of the defendant company, who voted against or were opposed to the resolutions passed at a general meeting of the defendant

company held on the 31st July, 1934, or at the instance of the said shareholders of the said company as represented by the plaintiffs or any of them; and that the plaintiffs do pay to the defendant company the costs occasioned by this motion, such costs to be taxed by the Assistant Registrar

And the second motion by the plaintiffs seeking to restrain the defendant company from giving effect to resolutions declared to have been passed at an annual general meeting of the shareholders of the company as set out in the plaint.

Shortly, the plaintiffs' grievance is that at an annual general meeting of the defendant company, certain proxies were rejected by the Chairman, and as the result, a resolution, to which the plaintiffs were opposed, was passed by a majority of votes.

The first and second plaintiffs were present in person at the meeting, and their votes were accepted and recorded. The third plaintiff was not present, but was represented by a proxy who voted, but whose vote was rejected on the ground that the instrument by which the proxy was appointed was irregular.

The third plaintiff only held 400 shares in the company. Mr. Will, for the defendants, has argued that in view of the small number of shares held by the third plaintiff, the result of the poll would have been unaffected by the rejection of his proxy's vote, and that therefore he has no ground of complaint.

To this proposition I cannot subscribe. The number of shares held by any shareholder is immaterial. If his votes were wrongly rejected, whether they were four or four thousand, his right would have been infringed, whatever may have been the result of the poll.

With regard to the first and second plaintiffs, Mr. Will argues that as they attended the meeting and their votes were recorded, they are not entitled to sue. He contends that their rights, as shareholders, terminated by the acceptance of their votes so far as that meeting was concerned, even though the resolution against which they voted, was passed owing to the alleged wrongful rejection of the proxies of other shareholders. Had the proxies been accepted, the resolution against which the first and second plaintiffs voted would not have been passed.

Mr. Will also argues that, in these circumstances, the first two plaintiffs and the third plaintiff had no common interest, in that, although the votes by the proxy of the third plaintiff were rejected, the votes of the first and second plaintiffs were accepted and recorded. He submits that although the plaintiffs voted (or in the case of the third plaintiff, endeavoured to vote) on the same side, against the resolution, this does not make the suit a representative one on behalf of all the shareholders who voted against the resolution.

The whole basis of this suit is the alleged wrongful rejection by the chairman of the meeting, of proxies. The right of the third plaintiff (whose proxy was rejected) to sue is not contested. With regard to the first and second plaintiffs, it has been held in numerous cases that a shareholder may sue the company on behalf of himself and the other shareholders. It has even been held that a shareholder is not debarred from claiming an injunction to restrain a company from acting on an *ultra vires* resolution by the fact that he has himself been a party to the passing of the resolution and has assented to illegal acts under it (*Mosely v. Koffyfontein Mines, Ltd.* (1911) 1 Ch. 73.)

Since the cause of the common grievance of all the plaintiffs is that the resolution was wrongly passed, on the same ground (viz. that proxies had been wrongly rejected) I am satisfied that they were entitled to join in suing the company on behalf of themselves and all other shareholders who voted against or were opposed to the resolutions in question, and, in this respect, had a common interest.

The essential condition of a representative action is, that the persons who are to be represented have the same interests as the person representing them in one and the same cause or matter.

Application was made to the Court by the plaintiffs under section 22 of the Civil Procedure Code to sue on behalf of or for the benefit of all persons interested and leave was granted to them, subject to advertisements being published in the "Times of Malaya" and the "Pinang Gazette" newspapers.

No person has, as the result of these advertisements, applied to the Court to be made a party to the suit; from which fact, the concurrence of the other shareholders mentioned, may be inferred.

Mr. Will has referred to the case of *Hardie and Lane, Ltd. v. Chiltern and others*, (1928) 1 K.B. 663, but in that case it was the defendants who as members of an association, were sued in a representative capacity by the plaintiffs who were also members of the association, and it has not been shown that the members of the association had the same interest in the action or the defence to it.

In the present case, we have a body of shareholders who voted or whose proxies wished to vote against a particular resolution. In my view, there can be no doubt that there was a common interest and a common grievance, which entitled the three plaintiffs to sue in a representative capacity.

Had the proxies been accepted, the resolution against which the plaintiffs and other shareholders voted would not have been passed, so that if the proxies were wrongly rejected, in my view, a wrong was done to the plaintiffs and other

shareholders, in respect of which they were entitled to sue.

I therefore hold that the defendants' motion fails, and it is dismissed with costs.

I will now deal with the motion by the plaintiffs, which, by consent, is treated as the trial of the action.

The motion prayed for an order that the defendant company, its officers and agents be restrained until judgment or further order from acting upon or giving effect to the resolutions declared to have been passed at the annual general meeting as set out in the plaint.

The only question is the validity of those instruments appointing a proxy which were attested by the alternative person named therein as proxy.

The proxy-papers in question were printed and made in the form required by Article 80 of the Articles of Association of the company. The first appointee named was Arthur James King "or failing him Lee Eng Hock". The shareholder's signature in each case was attested by Lee Eng Hock. At the time of the attestation, A. J. King was not present.

At the meeting, the chairman rejected these proxies on the ground that an appointee named in a proxy cannot attest the signature of the appointor therein named, and that the proxies were therefore invalid.

It is not disputed by the plaintiffs' counsel that where a single proxy is named in the proxy-paper and he attests the signature of the shareholder, such a proxy paper would be invalid, (*In re Parrott. Ex parte Cullen*, (1891) 2 Q.B. 151).

The question is, does the fact that the paper is attested by the proxy's substitute, also render the proxy paper invalid?

Both A. J. King and Lee Eng Hock were present at the meeting, consequently, Lee Eng Hock's provisional appointment as proxy "failing" Mr. King never materialized. Lee Eng Hock voted in his personal capacity as a shareholder present at the meeting; Mr. King sought to do so, as proxy for the shareholders who had appointed him.

In the present case, there can be no question as to the necessity for the attestation of the proxy-paper. Article 76 requires that it "shall be attested by one or more witnesses." The right of a shareholder to vote by proxy depends on the contract between himself and his co-shareholders, viz., the Articles of Association, and consequently all the requisitions of that contract, as to the exercise of that right must be followed. When the Articles require attestation of the proxy-paper, attestation is just as essential and as much a thing agreed between the parties as being of the essence of the proxy-paper, as its being in writing, or its being left at the office of the company a certain time before the meeting.

Apart from the Articles, attestation of a proxy-paper would be unnecessary, but since an

attesting witness is required, I have only to follow the law laid down by the Court of Appeal in *Seal v. Claridge*, 7 Q.B.D. 516, and say that at any rate he must not be a party to the transaction. That case arose out of the attestation of a bill of sale by a Solicitor, who was himself the grantee of the bill, and the attestation was held insufficient to satisfy the Statute. Whether attestation is required by Act of Parliament, or as in this case, by contract between the parties, is immaterial. The main point is that attestation is essential to the validity of the document in question.

What is the meaning of "attested" in Article 76? The word implies the presence of some person, who stands by but is not a party to the transaction, when the shareholder signs the proxy paper.

It has been argued by counsel for the plaintiffs that since Mr. King was present at the meeting and there was therefore no occasion for Lee Eng Hock to exercise his rights as a proxy-holder, the attestation is valid. I do not agree. Either the proxy-paper was valid or invalid when it was received at the company's office. If Mr. King had been prevented from attending the meeting, clearly, following *In re Parrott (supra)*, Lee Eng Hock could not have voted as the proxy of the shareholders who had appointed him, simply on the ground that he, being a party to the transaction, had attested the papers. Until the meeting started no one could say for certain that Mr. King would be able to be present. I cannot see how the fact that Lee Eng Hock was not called upon to act, "failing" Mr. King, can affect the validity of the proxy-papers. It seems to me a matter of common-sense that a party to a document, even though he may never be called upon to act under it, whether it be a deed, or a simple document such as a proxy-paper, cannot attest it. To admit such a practice would be to strike away the main object of attestation viz., that some independent person can, if necessary, be produced, who can give evidence as to the circumstances in which the maker of the document signed it.

I therefore hold that the instruments appointing proxies referred to in paragraphs 7 and 8 of the plaint were rightly disallowed by the chairman of the meeting on the ground that they were wrongly attested; and that the resolutions in question were properly carried.

Mr. Hogan for the plaintiffs has not supported the third prayer in the plaint, viz., that the refusal to adjourn the meeting was wrong. The fourth prayer asking for an order for an adjourned meeting to be held, consequently fails.

The motion by the plaintiffs is therefore dismissed with costs, and in the suit I give judgment for the defendant company with costs. Costs allowed on the higher scale on both motions.

Orders accordingly.